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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION**

ORACLE AMERICA, INC.

Plaintiff,

v.

GOOGLE, INC.

Defendant.

Case No. CV 10-03561 WHA

**ORACLE AMERICA, INC.'S OPPOSITION TO
 GOOGLE, INC.'S REQUEST FOR
 CONTINUANCE [DKT. NO. 804]**

Dept.: Courtroom 8, 19th Floor
 Judge: The Honorable William H. Alsup

Oracle submits this opposition to Google's request for a one week continuance of the trial in this matter, from April 16 to April 23. (Dkt. No. 804.)

I. Introduction

Normally, Oracle would not hesitate to agree to a brief continuance to accommodate the schedule of opposing counsel. Professional as well as personal commitments frequently require that counsel ask for, as well as grant, such courtesies. Unfortunately, both Michael Jacobs and David Boies, Oracle's co-lead trial counsel in this case, as well as other key members of the Oracle trial team, also have other trial commitments that would be threatened if the trial were delayed even a week. In particular, Mr. Jacobs has a trial set to begin May 31, and Mr. Boies has trials set to begin June 4, June 18, and June 25. As a result, changing the trial date to accommodate the schedule of Mr. Van Nest and other members of the Google trial team would necessarily cause equally significant conflicts for Mr. Jacobs, Mr. Boies, and other members of the Oracle trial team.

Further, it appears that a continuance would threaten to cause, rather than resolve, a conflict for Mr. Van Nest. If trial of *Oracle v. Google* is delayed one week, and lasts eight weeks, it will end on Friday, June 15. As stated in Google's motion, Mr. Van Nest is to commence trial in the *Genentech* matter before Judge Koh on Monday, June 11. Although Judge Koh has requested that the parties in that case agree to a two-week continuance, the defendant in that case has objected on the grounds that its own trial counsel from Irell & Manella are to begin yet another trial in Florida on July 2.

It thus appears that the only eight-week window when Mr. Van Nest currently has no other trial commitments is the one that begins April 16. An April 16 trial date provides the best opportunity for lead counsel and other counsel for *both* parties to fulfill existing June commitments set by other courts in other cases; an April 23 start date does not. Google's motion for a continuance should be denied.

II. Background

Oracle's co-lead trial counsel in this case are Michael Jacobs and David Boies. (Declaration of Michael Jacobs ("Jacobs Decl.") at ¶ 3; Declaration of David Boies ("Boies Decl.") at ¶ 3.)

Michael Jacobs's Trial Commitments

As disclosed in the parties' joint pretrial conference statement, Mr. Jacobs is lead counsel in *In the Matter of Certain Electronic Digital Media Devices and Components Thereof*, Investigation No.

337-TA-796, before the ITC. That matter is set for trial from May 31 to June 6. (Dkt. No. 644, at 4; Jacobs Decl. ¶ 4.)

Mr. Jacobs is also lead trial counsel in *Apple Inc. v. Samsung Electronics Co., Ltd., et. al.*, Case No. 11-cv-01846-LHK, in this district, which is scheduled for trial beginning on July 30. That trial is expected to last 3 to 4 weeks. (Jacobs Decl. ¶ 5.)

David Boies's Trial Commitments

Mr. Boies is lead trial counsel for the defendant in *Invista B.V., et al. v. E.I du Pont de Nemours and Company*, 08 Civ. 3063 (SHS) (S.D.N.Y.). On September 27, 2011, Judge Stein set that case for trial starting on June 4, 2012, and that trial is expected to continue until July. (Boies Decl. at ¶ 6; *Invista B.V., et al. v. E.I du Pont de Nemours and Co.*, 08 Civ. 3063, Dkt. No. 156.)

Mr. Boies is also lead trial counsel for Oracle in another case proceeding in this District, *Oracle USA, Inc. v. SAP AG*, No. C07-1658-PJH, before Judge Hamilton. On February 28, 2012, Judge Hamilton scheduled that case for trial on June 18, 2012; it will likely last two to three weeks. (Boies Decl. at ¶ 7; *Oracle USA, Inc. v. SAP AG*, No. C07-1658-PJH, Dkt. No. 1110.) Oracle had objected to the proposed June 18 trial date, specifically citing this Court's direction to keep April 16 to late June free for trial of this case. (*See Oracle USA, Inc. v. SAP AG*, No. C07-1658-PJH, Dkt. No. 1109, at 1–2.) The trial team in that matter includes Steven C. Holtzman, Fred Norton, and Beko Reblitz-Richardson, each of whom is a key member of the trial team in this case as well. Judge Hamilton has agreed that the SAP trial will trail the previously scheduled *DuPont* trial. (Boies Decl. at ¶ 7.)

Mr. Boies is also lead trial counsel for plaintiffs in *Rincon EV Realty LLC, et. al. v. CP III Rincon Towers, Inc., et. al.*, No. CGC 10-496887, in California state court in San Francisco. On February 24, 2012, the court in that matter set that case to commence trial on June 25, 2012, rejecting plaintiffs' request for a trial beginning in July. That trial will likely last two to three weeks. (Boies Decl. at ¶ 8.)

Mr. Boies is also lead trial counsel for the defendants in *Capital One Financial Corp. v. Kanas*, No. 1:11-cv-750 (LO/TRJ) (E.D. Va.). That case is set for trial on July 23, 2012 and is likely to last one week to two weeks. (Boies Decl. at ¶ 9.)

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Mr. Van Nest's Trial Commitments

As stated in Google's brief, Mr. Van Nest is lead counsel for plaintiffs in the matter of *Genentech Inc. v. Trustees of the University of Pennsylvania*, N.D. Cal. No. 5:10-cv-02037 LHK (PSG). As the Court is aware, Judge Koh has suggested to the parties in that case that their trial be delayed two weeks, from June 11 to June 18. Google's brief states that, "[a]ssuming the *Genentech* trial is in fact delayed two weeks, there would exist an available eight-week window from April 23 to June 15 in which the Court could try this case." (Mot., at 2, Dkt. No. 804.) The defendant in the *Genentech* case, however, has since informed Judge Koh that it cannot agree to the two week deferral of that trial, because its own trial counsel, from Irell & Manella, are to begin yet another trial on July 2, 2012 in the Middle District of Florida. (*See Genentech Inc. v. Trustees of the University of Pennsylvania*, N.D. Cal. No. 5:10-cv-02037 LHK (PSG), Dkt. No. 522.)

Accordingly, it appears that maintaining this case's current start date of April 16 would allow Mr. Van Nest to appear at each of the three trials he has committed to, in their entirety, even if the trial of this case lasts a full eight weeks. If the start of this trial is delayed until April 23, and the trial lasts the full eight weeks that the Court has allotted, Mr. Van Nest must either miss the end of this trial or the start of the *Genentech* trial.

III. Argument

All of the lead counsel in this case have very busy trial calendars. It is simply not possible for the Court to change the trial date to avoid inconvenience to Mr. Van Nest and other Google trial team members without causing a still greater inconvenience to Mr. Jacobs, Mr. Boies, and other members of the Oracle trial team.¹

If this trial begins on April 16 and last eight weeks, it will conclude on June 8, the Friday before Mr. Van Nest is to begin the *Genentech* trial, assuming that trial is not continued. But if the trial begins on April 23 and lasts eight weeks, it will conclude on June 15, the Friday before Mr. Boies, Mr. Holtzman, Mr. Norton, and Mr. Reblitz-Richardson are to begin the *Oracle v. SAP* trial. (Boies Decl. ¶

¹ Google cites a single case in support of its motion, *Felder v. Puthuff*, C-93-20303-RPA (EAI), 1995 WL 16821 (N.D. Cal. Jan. 13, 1995). In *Felder*, however, the attorney with a conflicting trial commitment submitted a declaration stating that no other attorney from his law firm could become sufficiently familiar with the case in order to replace him as trial counsel by the date set for trial. *Id.* at *3.

7.) Google's motion would not eliminate the problem of successive trials – it would simply shift some of the burden from one of Google's lawyers to four of Oracle's lawyers.

Moreover, both Mr. Jacobs and Mr. Boies have other trials that are scheduled to begin during the eight-week period of this trial. These trial dates were set in 2011, before this Court's admonition to keep April through June free for trial of this case. (*See* Jacobs Decl. ¶ 4; Boies Decl. ¶ 6.) If the *Oracle v. Google* trial begins on April 16, it is possible, consistent with the time limits previously established by the Court, and allowing time for jury deliberations, that all three phases of trial in this case would conclude in time for Mr. Jacobs to appear for the first day of trial in his ITC matter on May 31, for Mr. Boies to appear for the first day of trial in the *Invista* matter on June 4, and for Mr. Van Nest to appear for the first day of trial in the *Genentech* matter on June 11. If the trial is delayed a week, it is all but impossible for Mr. Jacobs to avoid a trial conflict, and it is significantly more likely that Mr. Boies and Mr. Van Nest will find themselves double-booked as well.

IV. Conclusion

For the reasons stated above, Oracle respectfully requests that the Court deny Google's motion for a continuance.

Dated: March 19, 2012

BOIES, SCHILLER & FLEXNER LLP

By: /s/ Steven C. Holtzman
Steven C. Holtzman

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ORACLE AMERICA, INC.